

The Honorable Judge Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PATRICIA COLE-TINDALL, in her official)	
capacity as the King County Sheriff; and KING)	No. 2:24-cv-00325-RAJ
COUNTY, a home rule charter county,)	
)	PLAINTIFFS' REPLY IN SUPPORT
Plaintiff,)	OF MOTION FOR PRELIMINARY
)	INJUNCTION
vs.)	
)	NOTE ON MOTION CALENDAR:
CITY OF BURIEN, a municipal corporation,)	<i>April 5, 2024</i>
)	
Defendant.)	
)	

I. INTRODUCTION

After Sheriff Cole-Tindall directed her deputies to suspend enforcement of Burien Ordinance No. 832 due to substantial concerns with its constitutionality, Burien Mayor Kevin Schilling questioned her “authority to determine what is and isn’t constitutional” and directed “that’s for judges to decide.” Second Declaration of Ann Summers, Ex C. But now that the constitutionality of Burien’s anti-camping ordinance is squarely before this Court, Burien is doing everything it can to avoid a judicial decision on the constitutionality of their novel and hastily adopted ordinance that:

- Criminalizes the use of “prohibited” areas of Burien for “living space” activities at all hours regardless of shelter availability;

- 1 • Criminalizes the use of “nonprohibited” areas of Burien for “living space” activities
- 2 between the hours of 6 a.m. and 7 p.m. regardless of shelter space availability;
- 3 • Makes an essential element of the crime turn on an uncodified and unpublished map
- 4 prepared by the City Manager that deems the bulk of Burien “prohibited” for “living space”
- 5 activities and allows the City Manager to change the map at any time for any reason;
- 6 • Gives legal force and effect to this secret map even when the map itself states that “[t]he
- 7 City of Burien disclaims any warranty or fitness of use for particular purpose, express, or
- 8 implied, with respect to this product;”
- 9 • Establishes a crime based on application of vaguely defined terms, including “living space”
- 10 activities that are “nontransitory” and the notion of possessing “indicia of camping” which
- 11 includes “personal belongings storage”;
- 12 • Prohibits “living space activities” in areas within 500 feet of *closed* schools, libraries,
- 13 parks, etc. between the hours of 7 p.m. and 6 a.m. without any governmental interest
- 14 whatsoever, much less a compelling one; and
- 15 • Leaves unhoused persons with no place anywhere in Burien to exercise normal activities
- 16 of living, or store personal belongings between the hours of 6 a.m. and 7 p.m., contrary to
- 17 existing Ninth Circuit precedent.

18 Dkt. 1-5, at 3-4. When considered on the merits, this is not a close case. A preliminary injunction
 19 should issue because Burien’s unprecedented and poorly drafted Ordinance No. 832 is facially
 20 unconstitutional.

21 **II. ADDITIONAL FACTS RELEVANT TO MOTION**

22 On March 27, 2024, Burien filed a complaint in Pierce County Superior Court against
 23 Sheriff Cole-Tindall and King County, alleging breach of contract based on the Sheriff’s refusal
 to enforce Ordinance 832. That action has been removed to federal court. *City of Burien v. Cole*
Tindall, et al., 2:24-cv-00433-MJP.

Burien failed to provide any declarations contesting the substantive facts submitted by
 Plaintiffs. As such, this Court is justified in relying on Plaintiffs’ undisputed factual averments in
 deciding this motion. *See* LCR 7(b)(2) (“if a party fails to file papers in opposition to a motion,
 such failure may be considered by the court as an admission that the motion has merit”).

III. ARGUMENT IN REPLY

A. Burien Has Failed to Demonstrate Reasonable Cause to Strike or Continue Plaintiffs' Motion.

Burien's "Objection/Motion to Strike and/or Motion to Continue Preliminary Injunction" substantively challenges this Court's jurisdiction to consider the motion for a preliminary injunction, but also alternatively seeks to strike or continue consideration of that motion. Dkt. 20. As such, it is essentially an untimely motion for relief from deadline. This Court should deny Burien's requests to strike or continue the motion or file an additional response.

1. Burien Cannot Demonstrate a Need for More Time When It Filed Its Response Prematurely.

The motion for a preliminary injunction was filed and served on March 14, 2024, with a noting date for April 5, 2024.¹ Under LCR 7(d)(3), opposition papers were due April 1, 2024. Burien filed its response on March 28, 2024—a full four days prior to the due date. As such, Burien's claim that it had "insufficient time to adequately prepare a full-throated response" to the motion is belied by its own decision to file its response four days early. Plaintiffs' motion raises a facial constitutional challenge. Burien does not identify additional facts that need to be developed or additional arguments it could not make in response that could not be developed by April 1. Burien cannot credibly cut four days off its own time to respond and then claim the time period is inadequate.² Moreover, Burien will have ample opportunity to address the merits of the constitutional claims before this Court makes a final determination in this case.

¹ Burien admits that on "March 14, 2024, Plaintiffs filed and served the PI Motion." Dkt. 20 at 7.

² Burien's lack of good cause is even more pronounced because it opted to use its available time to prepare and file a separate lawsuit against King County in Snohomish County Superior Court. The *strategic choice* to divert resources to another lawsuit in the face of a pending motion violates Burien's obligation to file "within the time prescribed in LCR 7(d) . . . a brief in opposition to the motion, together with any supporting material."

2. Burien’s Request for Relief From Deadline Violates the Local Civil Rules and This Court’s Standing Order.

The local rules allow a party to file a second Friday motion for relief from deadline. LCR (d)(2)(A). But Burien has ignored both this Court’s Standing Order (Dkt. 14) and LCR(j), which imposes an affirmative obligation on a party to “contact the adverse party, meet and confer regarding an extension.” Ironically, Burien failed to meet and confer before filing motions predicated on incorrectly arguing that Plaintiffs failed to meet and confer. Due to its violation of this Court’s Standing Order and LCR (j), the request for more time to file an additional response should be stricken. Burien refused to meet and confer despite multiple offers by King County to do so. *See* Sec. Dec. of Summers, ¶¶ 16-18; Declaration of Erin Overbey, ¶¶ 6, 9-10.

The local rules and this Court’s chamber procedures on general motions practice give Burien no reasonable expectation that it could file a partial response on March 28 and then be allowed an additional “full throated” response at a later date. The local rules plainly state: “Parties should not assume that the motion will be granted and must comply with the existing deadline unless the court orders otherwise.” LCR 7(j). Likewise, this Court’s chamber’s procedures direct that “[d]eadlines remain operational until the Court has ruled on a motion to extend those deadlines.”³

3. This Case Was Assigned to Judge Christel When Plaintiffs Filed and Served Their Motion and This Court’s Standing Order Did Not Apply.

Burien moves to strike the motion for a preliminary injunction claiming it was filed in violation of this Court’s Standing Order. But this case was originally assigned to Judge Christel under case number 2:24-cv-00325-DWC until March 15. Dkt. 6, 13. Judge Christel imposed no

³ In order to avoid this problem, both this Court’s chambers procedures and the local rule direct that parties should filed motions to extend a deadline well in advance of the actual deadline. LCR 7(j).

1 requirement that parties meet and confer prior to filing a motion. The motion for preliminary
2 injunction was filed on March 14 in full compliance with all applicable rules and orders.

3 The Standing Order was issued on March 15, when this case was reassigned to this Court.
4 No language in the Standing Order requires a party to strike all pending motions and refile only
5 after compliance with the Standing Order. The Standing Order’s “meet and confer” requirement
6 applies only to “counsel contemplating *the filing* of *any* motion,” not to counsel who previously
7 filed a motion before the Standing Order applied to the case. Dkt. 14, at 5 (bolded emphasis
8 added). Burien’s claim that Plaintiffs violated the Standing Order on March 14 is meritless. *See*
9 *e.g. Mykland v. CommonSpirit Health*, 3:21-CV-05061-RAJ, 2021 WL 4209429, at *4 (W.D.
10 Wash. Sept. 16, 2021) (“Put simply, CommonSpirit filed its motion before the Court entered its
11 standing order, so the meet and confer requirement did not apply at the time, and the Court will
12 not strike the motion to dismiss.”)

13 **4. Burien Cannot Use A Conflict That It Precipitated to Justify Striking or**
14 **Continuing This Motion.**

15 Burien claims that Plaintiffs somehow “delayed Burien’s ability to respond to the Motion
16 by (wrongly) asserting that Burien’s chosen outside counsel . . . were barred from representing
17 Burien due to a perceived conflict.” Dkt. 20 at 2-3. But Burien misrepresents both its role in
18 precipitating the conflict problem and its chosen counsels’ truncated view of professional ethics.

19 At the time that the Williams Kastner law firm accepted this case, King County was an
20 active client of the firm. Indeed, in discussions with Plaintiffs’ counsel on Friday, March 15, 2024,
21 Burien’s City Attorney acknowledged the conflict presented by Williams Kastner representing
22 Burien and asked King County to consider a waiver. Dec. of Overbey, ¶ 6. On Monday, March
23 18, 2023, consistent with both the Rules of Professional Conduct and its long-held policy, King
County informed Burien that it would not waive the conflict. *Id.*

1 *Despite actual notice of the conflict and King County's unwillingness to waive it, on March*
 2 *20, 2024, Williams Kastner filed a notice of appearance. Dkt. 16. After Mr. Brown advised King*
 3 *County of his firm's appearance and made a number of demands adverse to Plaintiffs' interests,*
 4 *King County promptly objected to the continued involvement of Williams Kastner in the case; it*
 5 *did not consent to having the firm appear in opposition to its current client, King County.⁴ In the*
 6 *five days between March 20 and March 25, no one from the Williams Kastner firm contacted*
 7 *Plaintiffs' counsel to address the conflict problem. Sec. Dec. of Summers, ¶ 14; Dec. of Overbey,*
 8 *¶ 7.*

9 Much to King County's surprise, Williams Kastner persisted in representing Burien in
 10 litigation against a current client. On March 25, 2024, Mr. Brown presented a letter in which he
 11 claimed that King County had "pre-waived" the conflict, thereby permitting Williams Kastner to
 12 appear in opposition to King County. *See* Dkt. 21, Dec. of Brown, Ex. G. But the alleged pre-
 13 waiver letter said nothing about appearing opposite King County in future litigation and certainly
 14 did not constitute informed consent.⁵ *See* RPC 1.7 (b)(4).

15 Despite the conflict precipitated by Burien and perpetuated by Williams Kastner, Sheriff
 16 Cole-Tindall and King County continue to believe that the public interest demands prompt and
 17 timely resolution of this motion regarding the constitutionality of Burien Ordinance No. 832. As
 18 such, rather than risk delay, King County informed Williams Kastner that it would waive the
 19 conflict of interest on March 25, seven days before the response to this motion was due. Sec. Dec.

21 ⁴ King County is a single legal entity under Washington law. Rev. Code of Wash. 36.01.010.

22 ⁵Just a few days later, Williams Kastner would take its position one step farther by actively suing
 23 its then current client in Snohomish County. At no time did Williams Kastner contact King County
 for an RPC 1.7(b)(4) informed consent waiver specific to its representation of Burien against King
 County. King County has subsequently fired Williams Kastner from representation of King
 County in other matters. Dec. of Overbey, ¶ 8.

1 of Summers, ¶ 16. But even prior to that waiver, Williams Kastner had clearly full undertaken
 2 representation of Burien, insisting that there was no conflict. Under these circumstances, this Court
 3 should flatly deny Burien's untimely request for relief from the applicable deadline.

4 **B. This Court Has Subject Matter Jurisdiction Because This Dispute Is Based on the**
 5 **Constitutionality of Ordinance 832 and Plaintiffs Have Established Standing.**

6 Burien makes a cursory challenge to this Court's subjection matter jurisdiction, without
 7 citing any authority. Dkt. 20, at 4 ("this Court does not currently have subject matter jurisdiction
 8 over this matter under 28 U.S.C. § 1331"). As pointed out in the complaint, the heart of this dispute
 9 is a federal question: whether Ordinance No. 832 is facially unconstitutional under the Eighth and
 10 Fourteenth Amendments. Dkt. 1. The fact that the answer to this federal question determines the
 11 parties' obligations under the Interlocal Agreement contract for police services (the "ILA") does
 12 not remove the matter from this Court's Article III jurisdiction. *See Powell v. McCormack*, 395
 13 U.S. 486, 514 (1969) (quoting *Bell v. Hood*, 327 U.S. 678, 685 (1946)) ("It has long been held that
 14 a suit 'arises under' the Constitution if a petitioner's claim 'will be sustained if the Constitution *
 15 * * (is) given one construction and will be defeated if (it is) given another.'").

16 As a party to the ILA with the obligation to police in a constitutional manner, Plaintiffs
 17 have standing to raise this federal question. In retaliation for Plaintiffs' refusal to enforce an
 18 unconstitutional injury and consistent with the allegations in the complaint, it is undisputed that
 19 Burien has declared King County in breach of the ILA, taken actions to withhold ILA payments
 20 for all police services, and filed suit against the county for alleged breach of the ILA. Such
 21 economic injury has long been recognized as a sufficient basis for standing. *Sierra Club v. Morton*,
 22 405 U.S. 727, 733-34 (1972). Moreover, as alleged in the complaint, the record is uncontroverted
 23 that the Sheriff and her deputies face the loss of professional certification and personal damages
 for enforcing unconstitutional laws. *See* RCW 43.101.105(3)(j)(ii), (iv) (a law enforcement officer

1 can lose their certification and livelihood by engaging in conduct that “demonstrates an inability
2 or unwillingness to uphold the officer's sworn oath to enforce the Constitution and laws of the
3 United States and the state of Washington”).

4 The imminent threat of economic injury to the Sheriff and King County is directly
5 traceable to Burien’s enactment of Ordinance No. 832 and Burien’s insistence on its enforcement.
6 The threatened injury would be redressed by a declaratory judgment from this Court because it can
7 be assumed that government actors will abide by a federal court’s authoritative interpretation of
8 the constitutionality of a law. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). *See also Reed*
9 *v. Goertz*, 598 U.S. 230, 234 (2023) (holding that plaintiff had standing because if the Court
10 determined that challenge statute violated due process it was “substantially likely” that the state
11 actors would abide by the court order).

12 Without citation to authority, Burien argues that the ILA somehow deprives this Court of
13 jurisdiction over the constitutional question because the ILA contains a partial dispute resolution
14 procedure. Burien prefers to have its novel unlawful camping ordinance actively enforced and
15 insulated from judicial review pending consideration by a panel of mayors. But Burien’s argument
16 ignores the fundamental fact that this dispute turns on the constitutionality of Ordinance No. 832—
17 a question that Burien’s own mayor recognizes is within the sole province of this Court.

18 Administrative remedies that are inadequate need not be exhausted. *Coit Independence*
19 *Joint Venture v. Federal Sav and Loan Ins. Corp.*, 489 U.S. 561, 587 (1989). Likewise, contractual
20 remedies that are inadequate to resolve constitutional questions need not be exhausted. *Clayton v.*
21 *International Union, et al.*, 451 U.S. 679, 693 (1981) (exhaustion of contractual remedies not
22 required where exhaustion would be a useless gesture). Taking a constitutional question before an
23 ILA Oversight Committee of mayors cannot resolve this constitutional dispute. *Marbury v.*

1 *Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) (“It is emphatically the province and duty of the
2 judicial department to say what the law is.”).

3 The ILA does not, and could not, require KCSO employees to enforce a facially
4 unconstitutional ordinance. First, the terms of the ILA provide only that disputes over “operational
5 problems” and disputes involving the interpretation of the ILA shall be referred to the Oversight
6 Committee. Dkt. 1-1, at 14. But the dispute in this case is neither a dispute over an “operational
7 problem” nor a dispute over the terms of the ILA. It is solely a dispute over the constitutionality
8 of Ordinance No. 832, and thus it is a dispute which the Oversight Committee lacks authority to
9 resolve.

10 Neither the Burien City Manager nor the Oversight Committee have authority under the
11 ILA to dictate police practices, including the oathbound duty of the Sheriff and her deputies to
12 police in a constitutionally compliant manner. For example, under the ILA, the parties agree that
13 authority over issues regarding the “use of force,” a constitutional question, “fall[s] within the
14 purview of the KCSO.” Dkt. 1-1, at 21. *See County of Los Angeles, Calif v. Mendez*, 581 U.S.
15 420, 427 (2017) (explaining that the reasonableness of force used by law enforcement is governed
16 by the Fourth Amendment). The professional and constitutional aspects of policing are matters
17 determined by KCSO based on direction from the courts, not the ILA’s Oversight Committee.

18 If the ILA did require KCSO deputies to violate the constitutional rights of citizens at the
19 direction of the City Manager or the Oversight Committee, it would be unenforceable as violative
20 of public policy under Washington law. Provisions of a contract are unenforceable on grounds of
21 public policy when the interest in their enforcement is clearly outweighed by a public policy
22 against the enforcement the provision. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wash.2d
23 48, 85, 331 P.3d 1147 (2014). A contract provision that requires a constitutional violation is

unenforceable as against public policy. *See Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 247, 133 P. 465 (1913); *City of Seattle, Seattle Police Dep't v. Seattle Police Officers' Guild*, 17 Wash. App. 2d 21, 38, 484 P.3d 485 (2021) (concluding that the right to be free from excessive force based on the constitution was an explicit, dominant and well-defined public policy such that arbitration award was invalid as violating it).

Because this case squarely presents a question of federal constitution law, Plaintiffs have standing to raise this question. A detour through the ILA Oversight Committee is both unnecessary and futile. This Court has jurisdiction to decide the case.

C. Plaintiffs Have Met the Burden for a Preliminary Injunction.

It is telling that Burien presents no cognizable argument that Ordinance No. 832 is constitutional. As noted in the motion and the introduction to this reply brief, the plain language of Burien's ordinance inexorably leads to the conclusion that it violates the U.S. Constitution.

Ordinance 832 creates a new criminal violation, and there is little doubt that the definition of that crime turns on a number of vague and ill-defined terms like "living space" activities, "exercise of nontransitory control," and "indicia of camping." "In a facial vagueness challenge, the ordinance need not be vague in all applications if it reaches a 'substantial amount of constitutionally protected conduct.'" *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940, (9th Cir. 1997) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). Notably, Burien proposes no narrowing construction that could render Ordinance 832 constitutional, nor could it consistent with the language of the ordinance.

Fair notice of a criminal violation of the ordinance is completely absent. Burien does not address the fact that "non-prohibited location[s]" where a person *ostensibly* could "camp, dwell, lodge, reside, sleep or exercise nontransitory exclusive control over" between the hours of 7 p.m.

1 and 6 a.m. “if there is no available overnight shelter” can only be determined by an unofficial,
 2 unpublished map that can be changed at any time at the discretion of the City Manager. *See*
 3 Ordinance 832, enacted as Burien Municipal Code 9.85.150(1)(a)-(b), 2(a), (3); Dkt. 1-5, at 4-5;
 4 Dkt. 1-6, at 4.⁶ Burien has offered no cogent argument that Ordinance 832 provides fair notice to
 5 citizens as to what conduct is prohibited and what is permitted.

6 Burien has failed to offer any cogent argument on how Ordinance No. 832 comports with
 7 the right to travel and the right to loiter in public places for innocent purposes, which are grounded
 8 in the Fourteenth Amendment. It offers no governmental interest, much less a compelling and
 9 narrowly tailored one, for keeping homeless persons 500 feet from *closed* schools, parks, daycares
 10 and libraries during overnight hours. It does not explain how closing all of Burien’s public
 11 property to “living space” activities between the hours 6 a.m. and 7 p.m. is remotely rational and
 12 not arbitrary.

13 Nor does Burien address the Eighth Amendment claim or attempt to distinguish *Johnson*
 14 *v. Grants Pass*, *supra*, and other controlling Ninth Circuit Precedent. Viewing these constitutional
 15 claims either alone or together, Plaintiffs have demonstrated a likelihood of success.

16 Sheriff Cole-Tindall and King County have also shown the likelihood of irreparable harm.
 17 Burien has not only withheld payments under the ILA, but recently sued King County in a separate
 18 matter to compel enforcement of an unconstitutional ordinance. As a state actor, Burien is
 19 attempting to use its authority to require unconstitutional and illegal law enforcement action.
 20
 21

22 _____
 23 ⁶ Not only is the City Manager’s map not posted, the current version of Burien Municipal Code 9.85.150 is itself not posted on the City’s website, even though the changes to the code became effective upon adoption of Ordinance 832 on March 4, 2024.

<https://www.codepublishing.com/WA/Burien/#!/Burien09/Burien0985.html#9.85.150>

1 Finally, a preliminary injunction is in the public interest. The claims at issue involve not
 2 only the rights of Sheriff Cole-Tindall and King County, but also the constitutional rights of
 3 citizens who are extremely vulnerable and thus most in need of constitutional protections. To be
 4 sure, by targeting unhoused persons with draconian restrictions on “living space” activities under
 5 threat of criminal prosecution, Burien’s readily apparent objective is to force its unhoused residents
 6 to flee the city limits. Any delay in resolution of this motion serves that purpose by allowing
 7 Burien to maintain an ordinance that makes an entire class of people both unwelcome and
 8 scapegoated. A preliminary injunction serves the public’s general interest in upholding federal
 9 constitutional rights. *Boyd v. City of San Rafael*, 2023 WL 6960368, at *28 (N.D. Cal. Oct. 19,
 10 2023) (granting limited preliminary injunction in regard to ordinance limiting homeless
 11 encampments).

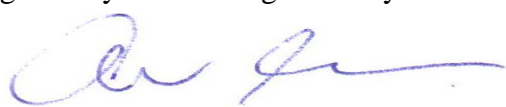
12 IV. CONCLUSION

13 For these reasons, Plaintiffs’ motion for a preliminary injunction should be granted.

14 *I certify that this Memorandum contains 3,626 words in compliance with Local Civil Rules.*

15 DATED this 5th day of April, 2024.

16 LEESA MANION (she/her)
 17 King County Prosecuting Attorney

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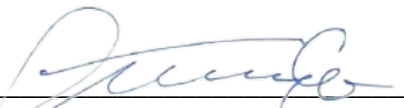
CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 5, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF electronic filing system which will automatically send electronic copy of the preceding to the following parties:

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I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 5th day of April, 2024.


RAFAEL A. MUNOZ-CINTRON
Paralegal I
King County Prosecuting Attorney's Office